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CONFIDENTIAL

MEETING OF THE CONTINUING COMMITTEE
OF MINISTERS ON THE CONSTITUTION

Report of the
Committee on Natural Resources,
Interprovincial Trade and
Powers over the Economy

Vancouver, British Columbia
July 21-25, 1980

The Committee on Natural Resources, Interprovincial Trade and Powers over the Economy met on July 22, 23 and 24. All governments were represented. The Chairman began by outlining the Committee's mandate, as determined by the Ministers at the meeting in Toronto on July 17. The Ministers had directed the Committee to examine the paper entitled "POWERS OVER THE ECONOMY: OPTIONS SUBMITTED FOR CONSIDERATION BY THE GOVERNMENT OF CANADA TO SAFEGUARD THE CANADIAN ECONOMIC UNION IN THE CONSTITUTION" (Document No. 830-82/007) which included drafts on revised Section 121, revisions to Section 91(2) and part 8 of the proposed Charter of Rights pertaining to mobility of citizens. In addition the Ministers directed the Committee to examine other drafts which might be forthcoming from other governments.

The Chairman indicated that, based on the officials' discussion on July 17, there did not appear to be a consensus on: (i) the nature and magnitude of the problem with respect to powers over the economy; (ii) the solutions (techniques) which might be adopted to solve the perceived problem; and (iii) the rationale for the linkage between the discussion on the topic of "Powers Over the Economy" and other aspects of the constitutional discussions, in particular natural resources.

The Committee began its deliberations by a detailed study and analysis of the federal government's proposed revisions to Section 121. (These are annexed to this report as Appendix I.) The federal government outlined the purpose and intent of the revisions stating that it wished to minimize economic discrimination within Canada based on provincial or territorial boundaries. This would not constitute an absolute prohibition of differentiated social and economic policies of governments. The Committee accepted the goal of furthering and maintaining the objectives of an economic union. The Committee's discussion on Section 121 appeared to polarize around which technique was more appropriate to maintain and further the objectives of the economic union, the expansion of Section 121 or a statement of principles coupled with a commitment to consultation amongst governments.

The Committee then addressed itself to the prohibitions found in Section 121(1). After some discussion it was agreed that Section 121(1) is not intended to apply so as to prohibit provincial legislation or policies having intraprovincial application but not discriminatory on the basis of the province of residence, origin or destination. Although such legislation or policies might be "discriminatory" within a province, it would not be discriminatory in the sense intended by Section 121(1).

In addition, the Committee agreed that governments would need to have some powers to legislate in ways that are discriminatory in the sense intended by Section 121(1). The Committee then addressed itself to the derogations therefrom found in Section 121(2) and (3).

In addition to the discussion on derogations considerable time was spent on the scope and meaning of specific words within the text, in particular the words "practice" and "unduly impedes". Some provinces expressed concern over the potential role of the courts in interpreting this section.

In addition to the material presented by the Government of Canada various other documents were submitted to the Committee for its consideration. These were:-

- (1) A.E. Safarian, "Ten Markets or One?" (Ontario Economic Council)
- (2) Ontario's Document No. 830-83/012 (See Appendix I A)
- (3) Quebec's Document No. 830-83/006
- (4) Saskatchewan's Document Nos. 830-83/003, 830-83/004, 830-83/005 and Saskatchewan's analysis of Document No. 830-82/007

The Ontario proposal for a revised Section 121, which concentrated on the intent rather than the effect of legislation and practice, was then discussed. Although the Ontario draft explicitly added a proposal for an exception for intra-provincial regional development programs, several provincial delegates thought that the Ontario proposal went further than the Government of Canada proposal because of the elimination of the "undue" test.

The Government of Saskatchewan paper (Document No. 830-83/003) was then discussed. It proposed an alternative technique with respect to constitutional revision of the subject "Powers Over the Economy".

Following the discussion of the two provincial papers the Committee focussed its attention once more on the concept of derogation from the principle outlined in Section 121(1). Several provinces expressed concern and disagreement with Section 121(3). Specifically they were concerned that Section 121(3) enhanced federal legislative powers while provincial governments were being required to curtail their legislative powers. Committee members noted that Section 121(3) had three separate provisions for continued federal legislative activity: (i) equalization and regional development; (ii) laws declared by Parliament to be in an overriding national interest; and (iii) laws enacted pursuant to an international obligation undertaken by Canada. Federal representatives assured the provinces that this wording was not intended to add to federal legislative powers and that rewording of the clause to clarify this point might be favourably considered. However, some provinces thought that this part should be extended to include provincial legislatures which should also be authorized to establish an "overriding provincial interest". Federal representatives disagreed believing that this defeated the very purpose of a revised Section 121.

Nova Scotia raised the possibility and desirability of including in the Constitution a specific list of derogations from the general

prohibitions on discrimination contained in revised Section 121 and offered a specific list.

The concept of a specific list of derogations precipitated a discussion on how and where to draw the line. If the list were too great the general principle would be destroyed; if the list were too short many accepted existing provincial policies could be nullified. One solution proposed was to develop derogations based on a proposal contained in the Pepin-Robarts Report. The report stated:-

"Similarly, we think preferential provincial purchasing policies should be permitted only in those cases where the province requires them to alleviate acute economic hardship. We further suggest that the justification for such practices and the time they are expected to last should be specified and should be agreed to by other provinces."

(Page 71) To some provinces this did not go far enough.

There was no agreement on how to define and limit the derogations. Some provinces were concerned that the wording of the new section should give clear guidance to the courts in interpreting it. Other governments wished to reduce the role of the courts by finding other ways of resolving disputes. It was stated by some governments that disputes with respect to discrimination should be resolved by the political process. This process could include First Ministers' Conferences or a revised second Chamber. It was further suggested that if the political process could not resolve the matter then there could be ultimate recourse to the courts.

An alternative "technique" to promote and maintain the economic union was proposed by Saskatchewan (Appendix II). Saskatchewan drew attention to the parallel between its proposal and the "best efforts" draft on equalization. Following a brief discussion which focussed on the lack of judicial enforceability of the commitments of all governments contained in the proposal, the officials agreed to forward it to the Ministers for their further consideration.

REVISIONS TO SECTION 91(2)

The Committee discussed changes proposed by the federal government to Section 91(2), trade and commerce (see Appendix III). Discussion focussed on three subject matters:

1. federal legislative powers over product standards;
2. federal legislative powers over competition policy; and
3. incorporation of the words "goods, services and capital" under the trade and commerce power.

1. Product Standards

As a result of the decisions by the Supreme Court in the "Lite" beer and Dominion Stores cases, the Government of Canada has concern that its legislative powers over uniform product standards have been significantly curtailed. This concern related to the differentiation in powers to set standards for products originating and consumed within a province and those being exported from the province in either interprovincial or international trade.

The discussion focussed on

- (a) the need for a constitutional amendment to solve this problem as opposed to other techniques such as intergovernmental agreements, delegation, adoption of federal standards by provinces or letting market forces prevail;
- (b) the implications of such an amendment on existing provincial legislative powers such as occupational health and safety and higher standards for certain products; and
- (c) the possibility of derogations from the federal standards in the case of products produced and consumed primarily within a particular province. Nova Scotia tabled an alternative draft which advanced this concept (see Appendix IV).

2. Competition Policy

The federal government outlined the difficulties it faced in incorporating and enforcing competition policy under criminal law power. It advanced the argument that a different grant of power under the head of trade and commerce was preferable. To a great extent the discussion focussed on the following questions:

- (a) Would this separate head under 91(2) add to or merely clarify federal legislative powers?

No conclusive answer was established.

- (b) What would the effect be on existing provincial legislative powers to regulate areas such as professions, utilities, marketing of agricultural products, liquor, insurance companies and provincial Crown corporations?

Again no definitive view emerged.

3. Section 91(2) - Trade and Commerce

The federal government argued that there was a need to clarify its legislative powers over trade and commerce and that, while a substantial body of opinion believed the existing section included services and capital, it was desirable to incorporate these words to avoid any possible doubts.

The discussion focussed on whether the addition of these words increased or clarified federal powers. Specific items of concern to the provinces included the effect upon credit unions, language policy, government borrowing, securities and professions. It was noted that there are ways of drafting reference to "services and capital" to minimize the risk of a judicial extension of the trade and commerce power.

Summary

In summary, the Committee's discussion focussed on two basic techniques to maintain the economic union. If the one advanced by the Government of Canada were pursued there appeared to be general agreement on the following:

1. The principles of the economic union should somehow be described.
2. Provincial governments should be permitted to discriminate within the province for regional development purposes provided such discrimination did not have an extra-provincial effect.
3. Some derogations from the general principles of the economic union should be provided for.

The Saskatchewan technique also recognized the need for an outline of the principles for an economic union. In this respect the two techniques, despite wording differences, were coming to grips with the same issue. The substantial difference was how best to safeguard the operation of the economic union.

NATURAL RESOURCES

There was a brief discussion on this topic. Part of the discussion was devoted to an explanation of the evolution of the 1979 "best efforts" draft. This included some of the reservations and concerns which various governments have with respect to matters such as: the definition of natural resources, compelling national interest, the linkage between provincial legislative powers over natural resources and federal powers over trade and commerce, indirect taxation and resources.

Because certain sections of the "best efforts" draft considered critical by some provinces were not acceptable to the Government of Canada, the Government of Alberta proposed, for discussion purposes, an alternative technique to limit federal powers over trade and commerce as this power affected natural resources (see Appendix V).

This led to a discussion as to whether or not the Government of Canada was prepared to consider limitations to its legislative powers over trade and commerce and to admit provinces to powers over the export of resources. While the federal government did not present a position it indicated that it was prepared to listen to what the provinces said with respect to this topic. It indicated that it continued to place priority on powers over the economy and a greater commitment on the part of the provinces to the economic union. It also indicated that it might consider subjecting the use of the declaratory power to review by a reformed Senate. This was supported by some provinces.

The Committee requests further ministerial direction with respect to the topic of natural resources and interprovincial trade.

DRAFT

FOR DISCUSSION PURPOSES ONLY

July 16, 1980

Canadian
economic
union

121. (1) Neither Canada nor a province shall by law or practice discriminate in a manner that unduly impedes the operation of the Canadian economic union, directly or indirectly, on the basis of the province or territory of residence or former residence of a person, on the basis of the province or territory of origin or destination of goods, services or capital or on the basis of the province or territory into which or from which goods, services or capital are imported or exported.

Derogation

(2) Nothing in subsection (1) renders invalid a law of Parliament or of a legislature enacted in the interests of public safety, order, health or morals.

Idem

(3) Nothing in subsection (1) renders invalid a law of Parliament enacted pursuant to the principles of equalization and regional development to which Parliament and the legislatures are committed or declared by Parliament to be in an overriding national interest or enacted pursuant to an international obligation undertaken by Canada.

Customs
union

(4) Nothing in subsection (2) or (3) renders valid a law of Parliament or a legislature that impedes the admission free into any province of goods, services or capital originating in or imported into any other province or territory.

Continuing Committee of Ministers on the Constitution

Vancouver, July 24, 1980

ONTARIO'S DISCUSSION PROPOSALS CONCERNING
RESOURCES AND POWERS OVER THE ECONOMY

Economic Principles

1. Ontario submits for discussion a proposed set of principles defining the nature and implementation of a Canadian Economic Union.
2. These principles could be inserted in the Constitution to serve as an introductory section preceding Section 121, or, as part of a General Statement of Principles.
3. Ontario's proposal is that these principles be made effective through a revised Section 121.

Section 121

4. A proposed revision by Ontario to the federal draft of Section 121 is attached.
5. It aims to remove the new concept of "unduly" in referring to impediments to the Canadian Economic Union and brings the intent within established constitutional doctrine.
6. It permits intra provincial discrimination to reduce substantial economic disparities among sub-regions of a province, and adds a derogation relating to the protection of culture.

ONTARIO DISCUSSION PROPOSAL ON PRINCIPLES
OF THE ECONOMIC UNION

1. The Government of Canada and the governments of the provinces jointly agree that the best economic and social interests of the people of Canada are to be promoted through the continuation and strengthening of the Canadian Economic Union in all parts of Canada.
2. The aims of the Canadian Economic Union are to foster and encourage through its laws and practices:
 - (a) equality of economic opportunity of persons residing in all provinces and of persons residing in sub-regions of a province;
 - (b) freedom of movement of people, goods, services and capital throughout Canada and the reduction and avoidance of impediments to that freedom;
 - (c) harmonization between governments of policies and practices relating to trade and commerce in order to promote national and regional economic growth;
 - (d) harmonization between governments of fiscal policies to stabilize and promote national and regional economic growth;
 - (e) rationalization by governments of the administration of public services so as to reduce and avoid overlap, duplication and waste.
3. Towards the achievement of these aims, the Government of Canada and the governments of the provinces commit themselves to the ongoing, systematic and co-operative review of the operation of the Canadian Economic Union.

FURTHER DISCUSSION DRAFT SECTION 121 - ONTARIO

July 23, 1980

- 121 (1) Canada is constituted an economic union within which all persons, goods, services, and capital may move freely and without discrimination based on province or territory of residence, or former residence, or origin or of destination in Canada.
- (2) Parliament or a legislature shall not enact a law in relation to the establishment or the authorization of discrimination or to the adoption of discriminatory practices contrary to subsection (1).
- (3) Nothing in subsection (2) renders invalid a law of Parliament or the legislature that would otherwise be valid if it is enacted in relation to the protection of culture, public safety, order, health or morals.
- (4) Nothing in subsection (2) renders invalid a law of Parliament that would otherwise be valid if it is enacted.
- (a) in accordance with the principles of equalization or regional development recognized in this Constitution;
 - (b) in relation to a matter that is declared by Parliament in the enactment to have an overriding national interest; or
 - (c) to perform an international obligation of Canada.
- (5) Nothing in subsection (2) renders invalid a law of a legislature that would otherwise be valid if it is directed at the reduction of substantial economic disparities between regions wholly within the province.
- (6) Nothing in subsections (3) (4) or (5) renders valid a law of Parliament or a legislature that impedes the admission free into any province of goods, services or capital originating in or imported into any other province or territory.

APPENDIX II

DOCUMENT: 830-83/004

DRAFT - For Discussion Purposes
Only - Saskatchewan
July 23, 1980.

THE CANADIAN ECONOMIC UNION

Without altering the legislative or other authority of Parliament or the legislatures or of the Government of Canada or the governments of the Provinces or the rights of any of them with respect to the exercise of their respective legislative or other authority:

(a) Parliament and the legislatures, together with the Government of Canada and the governments of the Provinces, are committed to

(i) the maintenance and enhancement of the Canadian economic union,

(ii) the movement throughout Canada of persons, goods, services and capital without discrimination by Canada or any Province, by law or practice, in a manner that unjustifiably impedes the operation of the Canadian economic union, and

(iii) the harmonization of federal and provincial laws, policies, and practices that affect the Canadian economic union; and

(b) pursuant to the commitments specified in clause (a), the Government of Canada and the governments of the Provinces are committed to the ongoing, systematic and co-operative review by them of the operation of the Canadian economic union.

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ANNEX C

FOR DISCUSSION PURPOSES ONLY

July 16, 1980

91. 2. The regulation of trade
and commerce in goods, services and
capital.

 2.1. The regulation of
competition throughout Canada and the
establishment of product standards
applicable throughout Canada where such
regulation or such standards are
reasonably necessary for the operation
of the Canadian economic union.

APPENDIX IV

NOVA SCOTIA

SUGGESTED RE-DRAFT OF SECTION 91(2.1)

- 91 (2.1) The regulation of competition throughout Canada.
- (2.2) The establishment of reasonable minimum product standards in Canada or in the various provinces or regions thereof; but any law of the legislature of a province concerning standards for products substantially produced and consumed within the province and which does not contravene Section 121 shall have paramountcy over a law of Canada passed pursuant to this subsection.

COMMENTS ON CHANGES FROM FEDERAL DRAFT

- (a) "reasonable minimum" product standards - new.
- (b) drops the requirement of being "reasonably necessary" for the operation of the Canadian economic union.
- (c) excludes products in intraprovincial trade only, where the province chooses to legislate.
- (d) provincial legislation would be subject to the tests of Section 121 - i.e., it could not discriminate in a way that "unduly impedes" the economic union, except for the reasons spelled out in the derogations.

APPENDIX V

July 23, 1980

ALBERTA DRAFT
FOR DISCUSSION PURPOSES ONLY

THE TRADE AND COMMERCE POWER

91. 2. The regulation of trade and commerce, but not including natural resources and the primary production therefrom.